within the meaning of section 4(c) of the Prevention of Corruption Act 1961.

In the instant case, the facts clearly showed that the time sheet (exhibit P3) was clearly used as basis for the respondent's claim to monetary benefits to which he was not entitled. It cannot be correct to say that exhibit P3 is meant only for internal use of the department. On the facts, exhibit P3 is clearly distinguishable from the returns made in *Tweedie*.

We accordingly answered the question in the affirmative and made no other orders.

Solicitors: *Messrs. Sri Ram, Zulkifly & Kumar.*

LEE FATT SENG v. HARPER GILFILLAN (1980) SDN. BHD.

[S.C. (Seah, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) September 23, 1986 and December 18, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 400 of 1985]

Labour Law – Termination benefits – Computation of – Whether rest days should be excluded in computation of average day's wages – Meaning of "Wages" – Employment (Termination and Lay Off Benefits) Regulations 1980, reg. 6 – Employment Act 1955, s.2(1).

In this case, the appellant had been retrenched by the respondent after working with the company for about 22½ years. He was paid termination benefits but he complained to the Labour Department that the computation of the termination benefits by the company was incorrect and the payment was short of the correct amount. The Assistant Commissioner of Labour held an inquiry at which it was argued on behalf of the appellant that rest days should be excluded from the twelve completed months' service in the computation of the average true day's wages on the ground that no work was done on rest days. If the total number of days was reduced by the exclusion of the rest days, the amount of average true day's wage would be greater than if the rest days were included in the total number of days in the twelve completed months. The Assistant Commissioner of Labour agreed to the appellant's contention and, accordingly, the award of termination benefits which he made was greater than the amount calculated and paid by the respondent. The respondent appealed to the High Court which disagreed with the Assistant Commissioner of Labour and held that the rest days should be excluded. The appellant appealed.

Held by a majority (Hashim Yeop A. Sani dissenting): (1) the average daily wages in a particular month should be arrived at by dividing the amount of the monthly wages by the total number of days in the month. This method seems to be consistent with the term "average true day's wages" contained in regulation 6(2) of the Employment (Termination and Lay-off Benefits) Regulations 1980. It is not correct to say that "wages" are only in respect of days on which work is actually done;

2) the decision of the High Court is correct and the appeal should be dismissed.

Cases referred to:

(1) *Bird* v. *British Celanese Ltd* [1945] 1 All E.R. 488.

(2) *Union Carbide Singapore Private Ltd.* v. *M.P. Gindon Nair* (unreported) (District Appeal No. 20 of 1972).

(3) *Keast* v. *The Barrow Hematite Steel Company* (1899) 15 T.L.R. 141.

SUPREME COURT.

Gurdial Singh Nijar (*Mohideen Abdul Kader* and *Miss Meenakshi Raman* with him) for the appellant.

C.V. Das for the respondent.

Seah S.C.J.: I have read the judgments prepared by my learned brothers, Hashim Yeop A. Sani S.C.J. and Wan Hamzah S.C.J. I agree that the appeal should be dismissed for the reasons stated in the judgment of Wan Hamzah S.C.J.

Hashim Yeop A. Sani S.C.J. (dissenting): The appellant was dissatisfied with the computation in order to arrive at termination benefits due to him under the Employment (Termination and Lay-Off Benefits) Regulations 1980 (the Regulations) when he was retrenched after 22½ years service with the respondent company. The appellant contended that rest days (Saturdays and Sundays) should be excluded from the computation in order to arrive at his average true day's wages under regulation 6(2). The respondent company, on the other hand, argued that rest days should be included.

What the appellant is entitled to under the regulations is termination benefits which shall not be less than 20 days' wages for every year of employment (regulation 6(1)(c)) and the amount to be computed is that which is to give him his "average true day's wages" for every 12 completed months of services (regulation 6(2)). It is clear from the language of the Regulations that for the purpose of giving termination benefits under regulation 6(1) and (2), we cannot but must first ascertain what is the true day's wages.

The appellant's complaint was that the computation of the termination benefits that was given to him should have excluded rest days to arrive at

the correct amount to reflect his average true day's wages. In my view, his complaint was perfectly and legally justified because he was under no contractual obligation to work on rest days.

The phase "average true day's wages" in regulation 6(2) and the words "for work done in respect of his contract of service" in the definition of wages in section 2(1) of the Employment Act are significant. Therefore for the purpose of computing the average true day's wages, rest days should be excluded as he was under no contractual obligation to work on rest days to earn his monthly salary. But public holidays should, however, be included even if the public holiday falls on a rest day.

The words "for work done" in the definition of wages must be given sufficient meaning and the words are not merely to exclude *ex gratia* payments because such payments are already excluded by the definition of "wages" itself.

What is wage is the sum agreed between the employer and the workman as payable for the work and it would seem clear that no wages were payable under the contract of employment for the rest days.

There are no cases directly in point but *Bird* v. *British Celanese Limited*[1] shows the importance of considering the contract of employment. The contract of employment in that case was oral but it included the acceptance of internal rules for work and behaviour. One of those made known to the workman was that the employer could temporarily suspend a workman from employment with a proportionate deduction from a week's wages for breaches of the factory rules such as wilful misconduct, breach of duty or disobedience to an order. Following the refusal of the workman to do certain work, he was suspended for two days. Subsequently, he agreed to comply and was reinstated. The workman brought an action in respect of the two days for £2 10s. 0d. as damages, or alternatively as wages. The county court judge found that the parties had contracted upon the terms that the contract might be suspended if the workman was guilty of serious misconduct and found that the workman had been so guilty; but he gave judgment for the workman on the footing that the Truck Act having made the suspension clause illegal, the employer had repudiated his contract entitling the workman to recover damages. On appeal, it was held that the suspension having been in accordance with the terms of employment the mutual obligation of the parties ceased for the two days of the suspension. Therefore non-payment of the two days wages was neither in the nature of a fine nor deduction to be computed by the appellant and in these circumstances, the Truck Act 1896 did not apply. In the judgment of Lawrence L.J. at p. 492 it was made clear that the contract was not a contract for any deduction from the sum contracted to be paid since no sum was ever contracted to be paid during a period of suspension.

I would accordingly allow the appeal with costs here and below. The order of the Assistant Director of Labour should be reinstated.

Wan Hamzah S.C.J.: The appellant was an employee of the respondent, Harper Gilfillan (1980) Sdn. Bhd. (the company), on a monthly salary. After working with the company for about 22½ years, he was retrenched on June 1, 1983. The company paid him a certain amount of money as termination benefits under the Employment (Termination and Lay-Off Benefits) Regulations 1980, but he complained to the Labour Department that the computation of the termination benefits by the company was incorrect and the payment was short of the correct amount. The Penolong Pengarah Buruh held an inquiry into the dispute under the Employment Act. The appellant's ground of complaint relates to the interpretation of regulation 6 and the meaning of "wages". That regulation in so far as it is relevant to this case reads:

> "6(1) Subject to the provisions of these Regulations, the amount of termination or lay-off benefits payment to which an employee is entitled in any case shall not be less than –
>
> (a) ...
>
> (b) ...
>
> (c) twenty days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for five years or more.
>
> and pro-rata as respect an incomplete year, calculated to the nearest month.
>
> (2) For the purposes of this regulation 'wages' shall have the meaning assigned thereto under section 2(1) of the Employment Act and 'a day's wages' shall be computed in such a manner so as to give the employee his average true day's wages calculated over the period of twelve completed months' service immediately preceding the relevant date."

In section 2(1) of the Act, there is the following definition:

" 'wages' means all remuneration which is payable to an employee for work done in respect of his contract of service but does not include –

(a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;

(b) any contribution paid by the employer on his own account to any pension fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme, or any other fund or scheme established for the benefit or welfare of the employee;

(c) any travelling allowance or the value of any travelling concession;

(d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;

(e) any gratuity payable on discharge or retirement; or

(f) any annual bonus or any part of any annual bonus which is not payable under the contract of service."

It was argued on behalf of the appellant that in view of the words "work done" contained in the above definition, rest days (*i.e.* Saturdays and Sundays) should be excluded from the twelve completed months' service in the computation of average true day's wages under regulation 6(2) on the ground that no work was done on the rest days, whereas the company contended that the rest days should be included. With the total number of days in the twelve completed months decreased by the number of rest days, the amount of average true day's wages would be greater than the amount calculated with rest days included in the total number of days in the twelve completed months. The Penolong Pengarah Buruh agreed to the appellant's contention and, accordingly, the award of termination benefits which he made under regulation 6(1)(c) was greater than the amount calculated and paid by the company. The company appealed to the High Court, and the High Court disagreed with the Penolong Pengarah Buruh and held that the rest days should not be excluded.

Before us, it was again contended on behalf of the appellant that a monthly paid employee is not paid wages in respect of his rest days, and he is paid in respect of five days of work in each week. Reliance was also placed on a passage in the judgment of the Chief Justice of Singapore in the unreported case of *Union Carbide Singapore Private Limited* v. *M.P. Gindon Nair,* which reads:

"... his monthly salary is computed on the basis that Saturdays and Sundays are non-working days for him and that his monthly salary is exclusive of payment for Saturdays and Sundays during which he is under no contractual obligation to work to earn his monthly salary."

In that case, Saturdays were not working days for the employee under the contract, and in 1971 four public holidays fell on Saturdays. The issue was whether he was entitled to be paid at his ordinary rate of pay in respect of the four public holidays which fell on Saturdays. The Chief Justice held that he was entitled to the payment by virtue of section 41(1) of the Employment Act of Singapore which provided that every employee shall be entitled to a paid holiday at his ordinary rate of pay provided that if any of the holidays falls on a rest day the working day following immediately thereafter shall be a paid holiday in substitution therefore. So the judgment of the Chief Justice was made on an issue which was entirely different from the issue in the present case. Under the collective agreement, the hours of work should not be more than 44 hours per week and the 44 hours of work were spread out and fixed on Monday to Friday, leaving Saturday and Sunday free. He worked the full 44 hours each week from Monday to Friday. The Chief Justice made the above-quoted statement expressly on the basis of the facts of that particular case especially the fact that the employee worked the full 44 hours per five-day week from Monday to Friday. In view of these, I do not think that the above-quoted statement of the Chief Justice can have any bearing in the present case. On the other hand, the fact that the employee was entitled to be paid in respect of the holidays which fell on Saturdays would be more consistent with the concept that Saturdays and other rest days are to be treated as working days for the purpose of ascertaining average day's wages than with the contention that the rest days should be excluded for that purpose.

In the definition of "wages" in the Employment Act of Malaysia, the words "work done" are not expressly used with reference to any particular time or period. There is no indication anywhere that they are intended to be used with reference to any particular time or period. Therefore, in my opinion, it is not correct to say that "wages" are only in respect of days on which work is actually done. The concept of monthly pay is that the wages or salary for a particular month is of the same amount as that for every other month. So the salary for January which has 31 days is of the same amount as the salary for

February which may have only 29 or 28 days. The wages or salary is of the same amount irrespective of whether there are the same number of working days in January as in any other month. In other words, the number of working days in the month is not relevant. For every purpose, the concept that for monthly pay the number of working days in the month is irrelevant should be adopted unless it is clear from the provisions of the law that for a particular purpose it is intended that a different treatment should be given. In conformity with this concept, the average daily wages in a particular month should be arrived at by dividing the amount of the monthly wages with the total number of days in that month. This method seems to be consistent with the term "average true day's wages' contained in regulation 6(2).

It seems that the words "work done" in the definition of "wages" are used so as to stress on the requirement that the remuneration must be for work done in respect of the contract of service of the employee concerned, so that any payment made to him by the employer *ex gratia*, not for work done or to be done, and not in connection with the contract of service, is not part of the wages.

In *Keast* v. *The Barrow Hematite Steel Company*[3] a workman brought a claim against his employer for compensation under the Workmen's Compensation Act 1897. Under The first Schedule to the Act, the compensation in respect of the period of incapacity was to be computed on certain percentage of the "average weekly earnings". For the employer, it was contended that the true method of arriving at the "average weekly earnings", within the meaning of the First Schedule to the Act, was to take the total amount the workman had earned during the previous twelve months – that was to say, if he had been so long employed – and divide that amount by 52, the number of weeks in the year. The contention on the part of the workman was that, in making the calculation, those weeks or days in weeks during which the workman had not been actually employed ought to be excluded, and that, therefore, where he had not been working continuously throughout the whole year, the divisor ought not to be 52, but some lower number. It was held by the Court of Appeal that the total amount of the year's earnings ought to have been divided by 52, and not by any less number excluding the weeks when the workman was not at work.

In my judgment, the decision of the High Court is correct. This appeal should be dismissed.

Appeal dismissed.

Solicitors: *Nijar & Nijar; Shook Lin & Bok.*

YAU SUN FATT v. PUBLIC PROSECUTOR

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Wan Hamzah S.C. JJ.) October 13 and November 30, 1987]

[Kuala Lumpur – Supreme Court Criminal Appeal No. 62 of 1985]

Criminal Procedure – Trial by jury – Admissibility of cautioned statement – Trial within trial – Judge ruling that cautioned statement is admissible – Evidence heard by jury to decide on weight to be given to cautioned statement – Application for accused to give evidence on cautioned statement – Application refused by trial judge – Accused deprived of fair trial – Criminal Procedure Code, s. 214.

In this case, on a trial of two charges of murder against the accused, the prosecution sought to put in a cautioned statement made by the accused while in police custody. On objection taken by the defence, the learned judge held a trial within a trial in the absence of the jury to determine the admissibility of the cautioned statement. After the learned judge had ruled that it was admissible, the jury then heard substantially the same evidence from the prosecution witnesses to decide on the weight to be given to the cautioned statement. The defence applied for the accused to give evidence.

It was contended that the accused was entitled to do so at that stage and did not have to wait until the defence was called. The learned trial judge, after hearing the prosecution, disagreed with the contention of the defence. The accused then elected to remain silent after the close of the prosecution case and he was convicted. He appealed to the Supreme Court.

Held: (1) in this case, the learned judge had ruled the cautioned statement to be admissible, so there is no reason why the same evidence could not be repeated in the presence of the jury, especially since the accused decided to remain silent when called for his defence;

2) the accused should have been allowed to give his evidence on the cautioned statement at that stage and cannot be denied his right to have his evidence repeated in the presence of the jury;

3) after the learned judge had ruled on the admissibility and the cautioned statement was admitted, the accused should be allowed to call all the witnesses who had given evidence in the trial within the trial before the learned judge alone to testify again in the presence of the jury and that